110-339

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1126.

THE UNITED STATES, APPELLANT,

vs.

FRANK A. BEHAN.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 12, 1883.

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THE UNITED STATES, APPELLANT,

vs.

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1 I. *Petition.—Filed Sept. 18th, 1882.*

FRANK A. BEHAN
vs.
THE UNITED STATES. } Petition.—Filed September 18, 1882.—J. R.

To the honorable Court of Claims:

Frank A. Behan respectfully prefers his petition, to wit:

First. That he is a citizen of the United States, residing in the city of New Orleans and State of Louisiana.

Second. That on the 26th day of December, 1879, John Roy entered into contract with C. W. Howell, major of engineers, United States Army, for making certain improvements in the harbor of New Orleans; and your petitioner, together with W. H. Beanham and F. E. Foucher, became bondsman for the faithful performance of said work.

Third. The said improvements were described in the said contract as follows:

"To manufacture, furnish, and place an artificial covering of cane mats over the sloping portions of the river front of the third district of New Orleans, Louisiana, in a similar manner, and in continuation of the same work as has been done heretofore under the direction of the said party of the first part, and as set forth in said specifications and proposals herewith attached." * * * * "It will consist—

"1st. Of a row of pine or cypress piles 12″ x 12″ x 65′, driven 6 feet apart, from center to center, along a line following the wharf front as nearly as possible—the line to be designated by the officer in charge or his assistant, as the work progresses. The piles to be driven until their tops are on a level with the top of the levee.

2 "2d. Of a carpet or apron covering the slope of the river bed from the specified line of piles, outward, to a depth in the river not exceeding 100 feet."

Fourth. February 10, 1881, said contract with John Roy was annulled by the United States Engineer Office; and by a letter of even date the said bondsmen were notified that should they "desire to continue the work on their own account, and under the terms of contract, they will please so notify this office, in writing, over their signatures, duly attested by a notary public, or other public officer, with seal of office." In compliance with this notice, your petitioner notified the said Engineer Office, March 14, 1881, of his desire and intention to continue the work already begun by the said Roy.

Fifth. April 9, 1881, petitioner was informed by the Engineer Office, in writing, of the exact extent of the work, and was given an estimate of the amount of material which he would be justified in purchasing for the said work in order to keep within the limits of the appropriation. Petitioner thereupon proceeded to purchase a large quantity of machinery and tools required for the work, at an expense of $7,038.09; and promptly proceeded with his preparations for the work. In pursuance thereof, he caused to be manufactured, and purchased, large quantities of sand-bags of peculiar size and shape, specially required for the projected improvements; large quantities of piles; large quantities of cane; and a vast quantity and variety of other articles necessary to the carrying out of the work accord-

ing to the plans and specifications; and all of which articles and materials are itemized and fully set forth in petitioner's account subsequently presented to the War Department, and now on file in this cause.

Sixth. After securing the said machinery, tools, articles, and materials, petitioner entered upon the actual construction of the improvements, and proceeded therewith as fast as practicable. In the said work, and in the preparation therefor, petitioner incurred many and varied expenses for assistance, labor of all kinds, towing, hauling, rent, docking, repairing, etc., all of which are fully set out in the account above referred to.

3 Seventh. Petitioner further devoted his entire time to superintending said preparations for and actual commencement of the work during a period of eight months, which time and services petitioner alleges were reasonably worth $3,500, which amount he has therefore included in the said account.

Eighth. September 12, 1881, a special board of engineer officers was constituted to inquire into the propriety of continuing the plan of improvements then in progress in the said harbor of New Orleans. September 23, 1881, the said board, by its president, reported to the chief of engineers, as follows:

"The board are unanimously of the opinion that the object sought to be accomplished by this improvement has not been attained, and they do not think that under the present plan of operations this object can be obtained.

"As the expenditures under present contracts amount to about $1,000 per day, the board have felt justified by their instructions in recommending an immediate suspension of operations, and this decision was announced to you by telegraph to-day."

Ninth. September 28, 1881, the Secretary of War directed that all operations for improving the harbor at New Orleans under the present plan should be at once discontinued. September 29, 1881, petitioner was notified of said order, and was advised by the engineer officer to govern himself accordingly; and further, that "the inspector will be retained long enough to make a thorough survey of what has already been accomplished, and to take an inventory of material, &c., now on hand."

Tenth. Immediately on receipt of said notification petitioner suspended all operations and requested instructions from the engineer office as to the boats, machinery, &c., constituting his "plant," to which a reply was received that the said office had no instructions to give concerning the same. Petitioner, therefore, in self protection, proceeded to dispose of the said "plant" upon the best terms possible. But many of the articles constituting said "plant" being of no value for general purposes, and there being little or no demand for them, petitioner only realized from

4 their sale the sum of $1,410.00, leaving a net loss on the said "plant" of $5,628.09, as is also set out in petitioner's account above referred to.

Eleventh. June 19, 1882, the Secretary of War, without taking any action thereon, transmitted petitioner's entire claim, with many of the papers, vouchers, and documents pertaining thereto, to this honorable court for adjudication.

The amount claimed by your petitioner in said account is $36,347.94, which amount is justly due to your petitioner, after allowing all just cred-

its and offsets. Wherefore petitioner prays judgment for the said sum of $36,347.94.

F. A. BEHAN, *Petitioner.*

STATE OF LOUISIANA, *ss:*

Personally appeared before me, a notary public of Orleans Parish, in and for the State aforesaid, Frank A. Behan, to me personally known, who made oath in due form and according to law that the statements made in the foregoing petition are true, and that no assignment or transfer of the claim as herein set forth, or any part thereof or interest therein, has ever been made, to the best of his knowledge and belief.

Witness my hand and seal, this fourteenth day of September, 1882.

[SEAL.] MARK BREEDEN, JR.,
Notary Public.

J. W. & G. L. DOUGLASS,
Attorneys for Claimant.

5 II. *General traverse.—Filed Jan'y 9th,* 1883.

And now comes the Attorney-General on behalf of the United States, and, answering the petition of the claimant herein, denies each & every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

6 III. *Motion to amend petition, and allowance thereof.—Filed March 8th,* 1883.

Now comes the said claimant by his attorneys, J. W. & G. L. Douglass, and asks leave to file the amended petition herewith enclosed as a substitute for the original petition heretofore filed in said cause.

J. W. & G. L. DOUGLASS,
Attorneys for Claimant.

MAR. 8, 1883.

Allowed.

W. H. R., *Judge, &c.*

7 IV. *Amended petition.—Filed Mar. 8th,* 1883.

To the honorable Court of Claims:

Frank A. Behan respectfully prefers his petition, to wit:

First. That he is a citizen of the United States, residing in the city of New Orleans and State of Louisiana.

Second. That on the 26th day of December, 1879, John Roy entered

into contract with C. W. Howell, major of engineers, United States Army, for making certain improvements in the harbor of New Orleans; and your petitioner, together with W. H. Beanham and F. E. Foucher, became bondsman for the faithful performance of said work.

Third. The said improvements were described in the said contract as follows:

"To manufacture, furnish, and place an artificial covering of cane mats over the sloping portions of the river front of the third district of New Orleans, Louisiana, in a similar manner and in continuation of the same work as has been done heretofore under the direction of the said party of the first part, and as set forth in said specifications and proposals herewith attached." * * * "It will consist—

"1st. Of a row of pine or cypress piles 12″ x 12″ x 65′, driven 6 feet apart, from center to center, along a line following the wharf front as nearly as possible—the line to be designated by the officer in charge, or his assistant, as the work progresses. The piles to be driven until their tops are on a level with the top of the levee."

8 "2d. Of a carpet or apron covering the slope of the river bed from the specified line of piles outward to a depth in the river not exceeding 100 feet."

Fourth. February 10, 1881, said contract with John Roy was annulled by the United States Engineer Office; and by a letter of even date the said bondsmen were notified that should they "desire to continue the work on their own account, and under the terms of contract, they will please so notify this office in writing, over their signatures, duly attested by a notary public, or other public officer, with seal of office." In compliance with this notice your petitioner notified the said Engineer Office, March 14, 1881, of his desire and intention to continue the work already begun by the said Roy.

Fifth. April 9, 1881, petitioner was informed in writing by Major C. W. Howell of the extent of the proposed work, and was given an estimate of the amount of material which he would be justified in purchasing for said work in order to keep within the limits of the appropriation, which limits were substantially stated at $52,000.

Acting upon this information, petitioner proceeded to purchase machinery and tools, and to have specially constructed a mat-barge, necessary for the work; which machinery, tools, and mat-barge constituted the "plant" for the work, and cost $7,038.09.

Petitioner further purchased 40,000 sand-bags of a size and shape specially required; also, 450,000 canes; also, 275 cypress piles of the dimensions described in the contract; and a great variety and quantity of other articles, all of which were necessary and proper for carrying on and completing the work according to the contract and specifications, and at a cost of $13,091.54.

Sixth. After procuring the machinery, tools, and materials above enumerated, petitioner proceeded to clear the river of obstructions, as called for by the contract, and also to remove some so-called obstructions not contemplated in the contract, but which he was ordered to remove by the engineer officers in charge of the work. Petitioner also employed a large number of workmen in constructing mats, such as are described in the contract; he also employed a large number of men in driving piles along the

line of the improvements, as called for by the contract, and otherwise proceeded with the entire work as fast as practicable. Upon the various branches of the work petitioner employed from fifty to eighty workmen daily during several weeks and a smaller number during several
9 months. In addition thereto he incurred expenses for hauling, docking, towing, pumping, repairing, and other matters, all of which were necessary and incidental to the work; and the sums so expended, together with the pay of laborers, amounted to $14,473.27.

Seventh. September 12, 1881, a special board of engineer officers was constituted to inquire into the propriety of continuing the plan for the improvement of the harbor of New Orleans which had been devised by the defendants' engineers, and work upon which was then in progress. September 23, 1881, the said board, by its president, reported to the Chief of Engineers, as follows:

"The board are unanimously of the opinion that the object sought to be accomplished by this improvement has not been attained, and they do not think that under the present plan of operations this object can be *ob*tained."

"As the expenditures under present contracts amount to about $1,000 per day, the board have felt justified by their instructions in recommending an immediate suspension of operations, and this decision was announced to you by telegraph to-day."

Eighth. September 28, 1881, the Secretary of War directed that all operations for improving the harbor at New Orleans under the present plan should be at once discontinued. September 29, 1881, petitioner was notified of said order, and was advised by the engineer officer to govern himself accordingly; and further, that "the inspector will be retained long enough to make a thorough survey of what has already been accomplished, and to take an inventory of material, &c., now on hand."

Ninth. Immediately on receipt of said notification petitioner suspended all operations and requested instructions from the Engineer Office as to the boats, machinery, &c., constituting his "plant," to which a reply was received that the said office had no instructions to give concerning the same. Petitioner, therefore, in self-protection, proceeded to dispose of the said "plant" upon the best terms possible. But many of the articles constituting said "plant" being of no value for general purposes, and there being little or no demand for them, petitioner only realized from their sale the sum of $1,410.00, leaving a net loss on the said "plant" of $5,628.09. As to the cane, sand-bags, and other materials procured and specially designed for the peculiar character of the work under the contract, they were without value for other purposes and became a total loss to your petitioner.

10 Tenth. Petitioner further shows that at the time of the suspension of operations under the contract the season of the year appropriate for sinking the mats had arrived, and the work had so far progressed that in sixty more working-days it could have been carried to completion at an additional cost to your petitioner (according to the most reliable estimates made just prior to the time the work was suspended) of $10,000.

Eleventh. Your petitioner therefore respectfully shows that his reasonable and necessary expenditures upon the work above described amounted

with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States; provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; provided that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part, or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

Payments shall be made to the said John Roy, reserving ten (10) per cent. from each payment until the whole work shall have been so delivered and accepted, at or near the close of each month's work, on measurement of covering in place on the bed of the river, on certificate of the inspector.

Neither this contract nor any interest therein shall be transferred by the said John Roy to any other party; and any such transfer shall cause the annulment of the contract so far as the United States are concerned. All

rights of action, however, to recover for any breach of this contract by the said John Roy are reserved to the United States.

No member or delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom. This contract shall not go into effect until approved by the Chief of Engineers, U. S. A., or the Acting Chief of Engineers.

In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

C. W. HOWELL, [SEAL.]
Maj. of Eng's, U. S. A.
JOHN ROY. [SEAL.]

II. Said Roy prosecuted the work under said contract during the year 1880, but his progress not being satisfactory to the engineer officers the contract was formally annuled February 10, 1881, and the bondsmen were addressed as follows:

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U. S. ENGINEER OFFICE,
No. 3 S. RAMPART STREET,
New Orleans, La., Feb. 10, 1881.

To Messrs. FRANK A. BEHAN,
WM. H. BEANHAM, and F. E. FOUCHER,
Sureties, New Orleans, La.:

SIRS: This office has to inform you that it has this day annulled the contract (dated Dec. 26, 1879) between Major C. W. Howell, Corps of Eng'rs, U. S. A., acting for the United States, and Mr. John Roy, for certain works of improvement on the 3rd district harbor front of the harbor of New Orleans, and for the due performance of which work you are bondsmen.

Due notice was given you from this office (under date of Jan'y 25, 1881) that recommendation to that effect would be made. A copy of the letter of recommendation is enclosed, marked "A;" also a copy of reply, marked "B."

It will be seen from the copy of reply (marked "B") that the bondsmen may claim the right to continue the work of their own account and under the contract, if they so desire.

Should the bondsmen desire to continue the work on their own account and under the terms of contract they will please so notify this office, in writing, over their signatures, duly attested by a notary public or other public officer, with seal of office.

It is considered by this office desirable to limit time for action of bondsmen in this matter as follows, viz:

If bondsmen do not indicate to this office, in the manner described above, their desire before March 15, 1881 (30 days' notice), it will be assumed that they waive their rights.

Should bondsmen give notice, as suggested above, within the above-named time, it will then be required that on or before the 30th of May, 1881, they show progress in the way of preparation for continuing the work sufficient to establish their good intention to begin laying of mats as soon as the river afterward marks a seven (7) foot stage on the Carrolton

gauge. Else, under the clause of contract requiring due diligence, recommendation for entire annulment and relet'ing, or direct assumption by the United States, will be made, so as to prevent injurious delay in resumption of work.

The annulment of contract does not in any way relieve either Mr. Roy or his bondsmen from their responsibility under the bond.

Very respectfully, your ob'd't servant,

C. W. HOWELL,
Major of Engineers.

March 14, 1881, the claimant notified Major Howell that he would undertake the work. The other sureties either failed to respond or withdrew, and Behan was recognized by the Engineer Office as the contractor. April 9, 1881, in response to claimant's inquiries, Major Howell addressed him as follows:

U. S. ENGINEER OFFICE,
No. 3 S. RAMPART STREET,
New Orleans, La., April 9, 1881.

Mr. F. A. BEHAN, *New Orleans, La.:*

SIR: In compliance with your verbal request I have to inform you that the upper line of the work which as "surety on bond" you have assumed, under contract of John Roy, covers the 3rd district harbor front of New Orleans from a point opposite the head of Mandeville street, and for a distance down stream (measured along crest of levee) of 2,262 feet; also a distance of 1,466 feet from the point where Roy suspended work to Congress street, or so much thereof as the money available will cover.

To thoroughly cover the first-named front with carpets 200 feet long, if laid exactly, will take 50,267 square yards, but in practice (owing to inexact laying) it will take a larger number of square yards to cover the ground as provided for in contract.

The lower section of 1,466 feet would require (exact) 32,577 square yards, but, as in the first section, you must allow for a large percentage of waste from inexact laying.

The number of square yards accepted by inspector, and for which the appropriation will be sufficient, will be, probably, not to exceed 77,000 or at most 80,000 square yards, according to amount of expense to which the U. S. may be put for inspection.

This information will enable you to limit your purchases, so that when work may be closed from exhaustion of appropriation under which contract was made you need have but little waste material on hand. I presume it is for that reason that you requested the information.

Very respectfully, your ob'd't servant,

C. W. HOWELL,
Major of Engineers.

15 III. The contract was of such a character as to require extendisive preparations and a large initial expenditure. The claimant made the necessary preparations for carrying on the work to completion and in procuring boats, tools, materials, and apparatus for its prosecution. He engaged actively in carrying out the contract on his part, incurred large ex-

penditure for labor and materials, and had for some time proceeded with the work when the undertaking was abandoned by the defendants and the work stopped, without fault of the claimant, as set forth in the following letters:

U. S. ENGINEER OFFICE, BOARD ROOM,
No. 3 S. RAMPART STREET,
New Orleans, La., Sept. 23rd, 1881.

GENERAL: The Board of Engineer Officers convened by your Special Order No. 97, to consider & report upon the work of improvement of New Orleans Harbor, have been in session here since the 20th inst. They have carefully examined into the whole subject & are now prepared to report upon the first clause of the instructions furnished for their guidance, that is, upon the propriety of continuing operations under the present plan of improvement.

The Board are unanimously of the opinion that the object sought to be accomplished by this improvement has not been attained, and they do not think that under the present plan of operations this object can be obtained.

As the expenditures under the present contracts amount to about $1,000 per day, the Board have felt justified by their instructions in recommending an immediate suspension of operations, & this decision was announced to you by telegraph to-day.

The Board will submit a preliminary report covering this portion of the subject as soon as it can be prepared, probably in the course of 10 or 12 days.

Their final report on the whole subject cannot be presented for some time, as additional surveys are imperatively needed for the preparation of reliable plans & estimates. This work will be undertaken at once, & as soon as the results are available the Board will reconvene for the preparation of their final report.

I am, general, very resp'f'y, your ob'd't servant,
CHAS. R. SUTER,
Major of Eng'rs, U. S. A., Pres'd't of Board.

Brig. Gen. H. G. WRIGHT,
Chief of Engineers, U. S. Army, Washington, D. C.

UNITED STATES ENGINEER'S OFFICE,
404 MARKET STREET,
Saint Louis, Missouri, October 5, 1881.

GENERAL: The Board of Engineer Officers constituted by Special Orders No. 97, headquarters Corps of Engineers, September 12, 1881, to examine the present condition of the work in progress for the protection of the river front of New Orleans, La., had by your letter of instructions of September 12, 1881, two subjects presented for its consideration, viz:

1st. The question of the propriety of continuing the present plan of improvement; and,

2d. To examine anew into the subject of the improvement with all the light that the experience of the officer in charge might afford, and, if found necessary, to consider and mature a new plan for the protection of the river front. * * *

(The part omitted contains the views, and the reasons therefor, of the Board, which are not material in this case.)

The Board is therefore forced to the conclusion that the present plan of improvement, whether viewed in outline as to its general merits or in detail as to its method of execution, should not be continued.

CHAS. R. SUTER,
Maj. of Eng'rs, U. S. A., Pres'd't of Board.
W. H. H. BENYAURD,
Major Engineers.
AMOS STICKNEY,
Maj. of Eng'rs, U. S. A.
O. H. ERNST,
Capt. of Eng'rs, U. S. Army.

Brig. Gen. H. G. WRIGHT,
Chief of Engineers, U. S. A., Washington, D. C.

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U. S. ENGINEER OFFICE,
NO. 3 S. RAMPART STREET,
New Orleans, La., Sept. 29, 1881.

Mr. F. A. BEHAN:

SIR: The following telegram has been just received from the Chief of Engineers:

WASHINGTON, D. C., *Sept.* 28, 1881.

Maj. HOWELL, *Eng'rs, N. O., La.:*

Secretary of War directs that all operations for improving harbor at New Orleans under present plan be at once discontinued.

WRIGHT,
Ch'f of Eng'rs.

NEW ORLEANS, *Sept'r* 30, 1881.

Maj. C. W. HOWELL,
U. S. Engineer in charge of Harbor Works, New Orleans:

DEAR SIR: Your communication of yesterday transmitting the copy of telegram from Secretary of War, through Gen'l Wright, Chief of Engineers, directing the discontinuance of harbor works, has been received. Your instructions in connection therewith will be carried out. I have ordered all work stopped and have left a proper force of men to take care of the apparatus, materials, &c., and now await further advices from you.

Permit me, in connection with above, to call your attention to the fact that the launching boat, pile-driver, and triangle now lay in a very exposed position, with a mat nearly complete for launching. Your instructions relative to placing the plant in a safe locality while not in use is requested.

Very respectfully,

F. A. BEHAN.

IV. The claimant thereupon closed up his work and sold the materials which he had on hand. Nothing has been paid to him for work, materials, or losses.

The actual and reasonable expenditures by the claimant in the prosecution of his work, together with his unavoidable losses on the materials on hand at the time of the stoppage by the defendants, were equal to the full amount claimed therefor in his petition, $33,192.20.

It does not appear from the evidence thereon on the one side & the other whether or not the claimant would have made any actual profit over and above expenditures, or would have incurred actual loss had he continued the work to the end and been paid the full contract price therefor.

CONCLUSION OF LAW.

Upon the foregoing findings of facts the court decides as a conclusion of law that the claimant is entitled to recover the sum of $33,192.20.

VII. *Opinion of the court.*

RICHARDSON, J., delivered the opinion of the court:

The claimant was one of the sureties on the bond of a contractor who had entered into an agreement with the defendants to perform certain work on a public improvement on the Mississippi River in the harbor of New Orleans.

The contractor having failed to prosecute the work to the satisfaction of the defendants' officers, his contract was annulled by their order on that account. The claimant, who, as such surety, was under liability to the defendants for damages for breach of contract on the part of his principal, if any damages were done thereby, was permitted to assume the
17 contract himself in the place of his principal, and thereafter to go on with the work as though he had been the original and sole contractor.

Relying upon the obligations of the defendants thus renewed and entered into with him, the claimant made extensive preparations in procuring boats, tools, apparatus, and materials for the prosecution of the work, entered actively upon the duties he had undertaken, and expended large sums of money therefor and for work and labor in the prosecution of the projected improvement.

While in the midst of his undertaking, without fault on his part, but because it was found by the defendants' officers that the plan of improvement would not accomplish the object intended, the claimant was notified by the Secretary of War that all operations for improving the harbor at New Orleans under the existing plan were at once discontinued, and thereupon he ceased to proceed further with the work.

The findings show that the actual expenditures of the claimant up to that time, together with his unavoidable losses on the materials on hand, amounted to the sum of $33,192.20. Nothing was paid to him. Instead of settling his account in the Department, the Secretary of War transmitted the case to this court, under Revised Statutes, section 1063, that the amount due him might be judicially determined.

The court has been unable to determine from the evidence, and on account of the peculiarity of the work and the difficulty, if not impossibility, of demonstrating what it would have cost to complete the contract, whether or not the claimant would have made any profits beyond his expenditures had he been permitted to go on with it to the end.

Whatever rule may be adopted in calculating the damages to a contractor when, without his fault, the other party, during its progress, puts an end to the contract before completion, the object is to indemnify him for his losses sustained and his gains prevented by the action of the party in fault, viewing these elements with relation to each other. The profits and losses must be determined according to the circumstances of the case and the subject-matter of the contract. The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part, and the probable cost of its completion, the whole contract-price, and the estimated pecuniary result, favorable or unfavorable to him, had he been permitted or required to go on and complete his contract, may be taken into consideration. (Sickels' Case, 1 C. Cls. R., 214; Speed's Case, 2 C. Cls. R., 429; affirmed on appeal, 8 Wall., 77, and 7 C. Cls. R., 93; Wilder's Case, 5 C. Cls. R., 468; Bulkley's Case, 7 C. Cls. R., 543, 19 Wall., 37, and 9 C. Cls. R., 81; Parish's Case, 100 U. S. R., 500; Field's Case, 16 C. Cls. R., 434; Moore & Krone's Case, 17 C. Cls. R., 17; Power's Case, decided at this term; Masterson v. City of Brooklyn, 7 Hill, 71.)

The amount of the claimant's unavoidable expenditures and losses already incurred are set forth in the findings. But we can give him nothing on account of prospective profits, because none have been proved. So, for the same reason, we can deduct nothing from his expenditures on account of prospective losses which he might have incurred had he not been relieved from completing his contract. This leaves his expenditures as the only damages proved to have resulted to him from the defendants' breach of contract, and are, therefore, the proper measure of damages under all the circumstances of the case.

The judgment of the court is that the claimant recover the sum of $33,192.20.

18 VIII. *Final judgment.*

At a Court of Claims held in the city of Washington on the 28th day of May, A. D. 1883, judgment was ordered to be entered, as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Frank A. Behan do have and recover of and from the United States the sum of thirty-three thousand one hundred and ninety-two $\frac{20}{100}$ dollars ($33,192.20).

19 IX. *Application for and allowance of appeal.—Filed Aug.* 24, 1883.

From the judgment rendered in the above-entitled cause on the 28th day of May, 1883, in favor of claimant, the defendants, by their Attorney-General, on the 24th day of August, 1883, make application for and give notice of an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Allowed.

C. D. DRAKE, *Chief Justice.*

20 X.

In the Court of Claims.

FRANK A. BEHAN
vs.
THE UNITED STATES. } No. 12966.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the final judgment, of the application of defendants for and allowance of appeal to the Supreme Court, and of the allowance of the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this tenth day of October, A. D. 1883.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsement on cover:) No. 1126. The United States, appellant, vs. Frank A. Behan. Court of Claims. Filed 12th October, 1883.

110-329

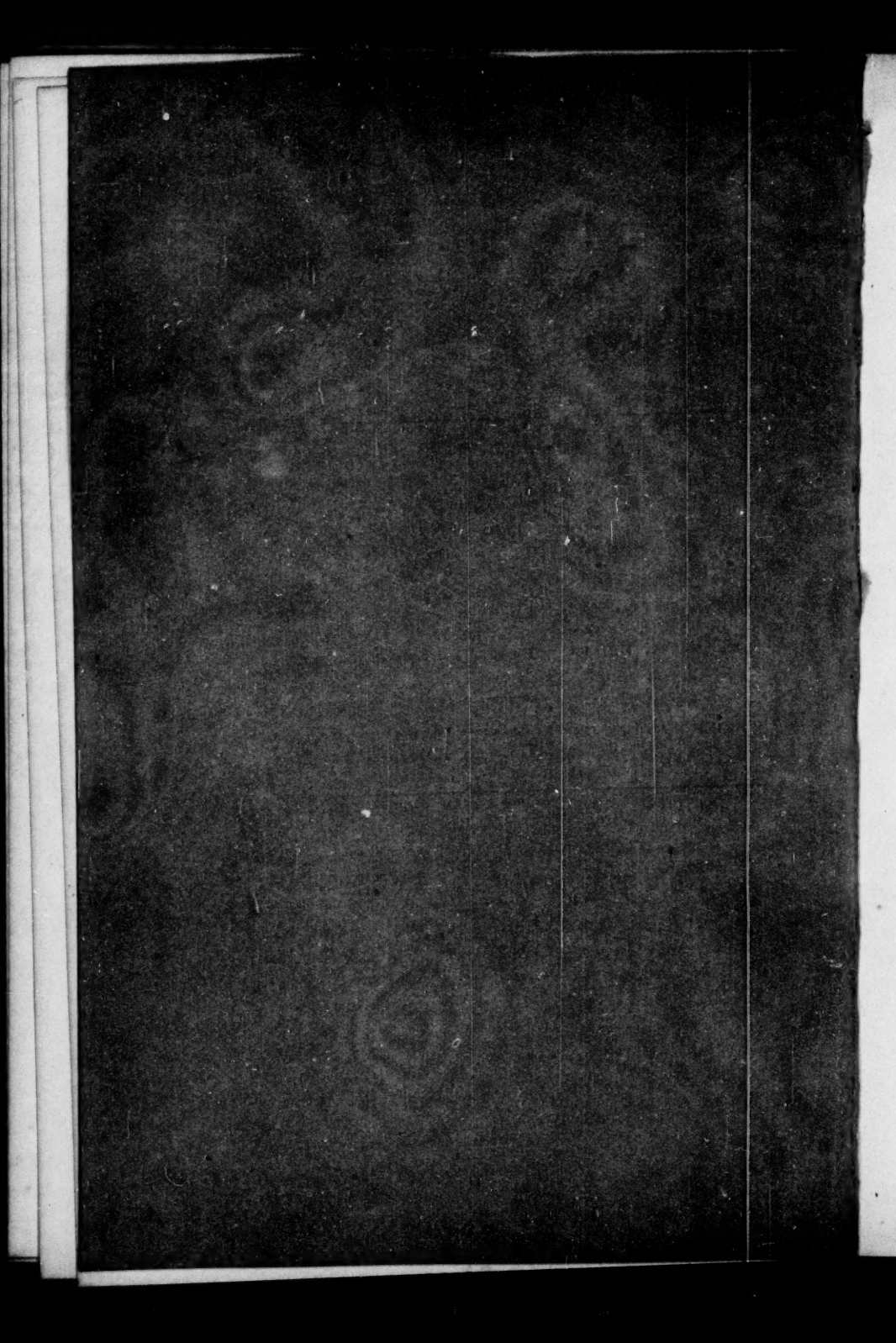
OFFICE SUPREME COURT U. S.
FILED
NOV 27 1883
JAMES H. MCKENNEY, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES
v.
FRANK A. BEHAN. } No. 1126.

BRIEF FOR THE UNITED STATES UNDER RULE XX.



In the Supreme Court of the United States.

THE UNITED STATES
v.
FRANK A. BEHAN. } No. 1126.

BRIEF FOR THE UNITED STATES UNDER RULE XX.

The Court of Claims rendered judgment in favor of Frank A. Behan for $33,192.20 by reason of the discontinuance by the United States of work which he had undertaken as surety for John Roy, a contractor with the United States. The contract as assumed by Behan was in substance to cover the sloping portions of the bed of the Mississippi River at the third district of New Orleans with cane mats extending 200 feet into the river, the work to continue along the bank such distance as to make the area covered 77,000 square yards, the mats to be weighted down and to be secured at the shore ends to piles 7 feet apart. The United States promised to pay therefor 65 cents per square yard for all such sloping portion of the river bank as the said mats would cover. After some work had been done under this and similar contracts the whole scheme was abandoned by the proper officers of the United States, because in their judgment it would prove ineffectual to protect the bank of the river. Behan's claim filed at the War

Department was transmitted to the Court of Claims without action, under section 1063, Rev. Stat. He thereupon filed a petition, stating his claim to be for $36,347.94 (pp. 1, 2, 3), without any intimation of rescission on his part; subsequently he filed an amended petition (pp. 4, 5, 6), in which he demanded $8,807.10 for profits of which he had been deprived by the breach, and $33,192.90 as reimbursement for his expenditures.

It was contended by the United States at the trial (1) that, the contract being a definite one, the amount which claimant would have received if permitted to complete was easily ascertainable; (2) that the evidence before the court showed that the cost of completion would have been at least $29,469.50, in addition to the amount already expended; (3) that if the court could not ascertain from the evidence what it would have cost to complete, the *onus* rested upon the claimant, and the case should be remanded until sufficient evidence was produced.

The claimant contended that the evidence showed that by completing his contract he would have made a profit of $8,807.10, and therefore this sum should be added to his actual expenses in fixing the judgment. He further contended that if the evidence did not show any prospective profits he was still entitled to his actual outlay, whether or not the evidence showed that he would have lost by completion.

The fourth finding of the court was as follows:

> The claimant thereupon closed his work and sold the materials which he had on hand. Nothing has been paid to him for work, materials, or losses.
>
> The actual and reasonable expenditures by the claimant in the prosecution of his work, together with his unavoidable losses on

the materials on hand at the time of the stoppage by the defendants, were equal to the full amount claimed therefor in his petition, $33,192.20.

It does not appear from the evidence thereon on the one side and the other whether or not the claimant would have made any actual profit over and above expenditures, or would have incurred actual loss had he continued the work to the end and been paid the full contract price therefor.

It is assigned for error that the court rendered judgment for claimant instead of for the United States.

ARGUMENT.

The United States do not refuse to place Mr. Behan by means of a judgment just where he would have been if he had been allowed to complete, and we think that is all the Court of Claims should have attempted to do. The effect of the judgment is to place him where he was before he signed the contract, that is to say, to compensate him not only for the losses consequent upon our breach, but also for the losses which resulted from his guarantee of Roy.

By asking for the profits alleged to be assured by the contract, claimant has in his petition asserted the existence and vitality of the contract. The whole argument below proceeded on the theory that there was no rescission; it is not found as a fact by the court that the claimant ever did rescind, and the silence of the opinion on the subject indicates that the contract has been treated on all hands as unrescinded. This being the case, the rule of damages is well settled in United States *v.* Speed, 8 Wallace, 77, to

be, per Miller, J. (pp. 84, 85), "the difference between the cost of doing the work and what claimants were to receive for it, making reasonable deduction for the less time engaged and for release from the care, trouble, risk, and responsibility attending a full execution of the contract."

The court below acquiesced in this rule (Record, p. 14), saying: "The progress attained, the unfinished part and the probable cost of its completion, the whole contract price, and the estimated pecuniary result, favorable or unfavorable to him, had he been permitted or required to go on and complete his contract, may be taken into consideration."

On the ground that the cost of completion could not be ascertained from the evidence, and that obtaining the evidence would be difficult if not impossible, the court substituted the rule applicable in an action on an implied contract.

The difficulty of obtaining any required evidence is no argument for changing a rule of damages, and in many cases actual impossibility would not do so. If the impossibility of proof in a case resulted from the death of witnesses, it would be deemed the misfortune of the party dependent on them, but would not change the measure of damages. Still less should a difficulty not insurmountable in obtaining proof cause such substitution. The case of Sickles, 1 Court of Claims, 214, cited by claimant, was one in which the work contracted for was abandoned because it was found to be physically impossible, and the court allowed recovery for the work done. Here the work was abandoned because completion was deemed useless; the work was not impossible and the cost of completion

not unattainable. It was urged by counsel for claimant that the rule in Speed's case has only been applied in cases where the plaintiff was suing for profits, and that there is no case reported where a plaintiff by reason of the application of that rule recovered less than his actual outlay, so long as that outlay was less than the contract price. His position seems to be that he can sue on the contract, and if he introduces sufficient evidence to show what would be the cost of completion, so that the court would in its findings set forth (1) the difference between the contract price and the cost of completion, (2) the actual expenditures, the greater of the two sums should be the amount of the judgment. He further contends that if the evidence fails to show the first, the latter should be the amount. Our position is that, whether greater or less than the actual expenditures, the difference between the contract price and the cost of completion should be the measure of damages, and that until this difference is ascertained there can be no recovery.

It is difficult to see why the rule should shift with the evidence. If claimant comes into court looking for "gains prevented," and presents *the contract as the measure of his rights*, it should remain so, even if it gave to him less damages than he could recover with the contract obliterated.

The moment when he undertook to carry out Roy's contract he either shifted to his own shoulders the loss which Roy had inflicted on himself by entering into the contract, or acquired a right to the profits which Roy had obtained for himself. When the contract was broken by the United

States, Behan, conceiving the latter to be the case, asked to be restored to the status he occupied before the breach. That we concede may be done when he proves what that status was.

JOHN S. BLAIR.

S. F. PHILLIPS,
Solicitor-General.

110-329

OFFICE SUPREME COURT U.S.
FILED
DEC 17 1893
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

THE UNITED STATES
vs.
FRANK A. BEHAN. } No. 1126.

BRIEF FOR THE APPELLANTS, IN REPLY.

The learned counsel for the appellee misapprehends our position, in assuming that we contend "that the claimant ought not to have recovered anything."

That is not and has never been our contention.

In the court below it was argued on behalf of the United States that the amount to have been received by claimant upon *completion* was $50,050 (*i. e.*, 77,000 square yards, at 65 cents per square yard), and that the evidence before the court showed that *the cost of completion* (in addition to the outlay of claimant at the time of the breach) would have been $29,469.50, so that the recovery should not be for more than the difference, to wit, $20,580.50.

In this court we have again submitted that the above is according to the proper rule of damages.

JOHN S. BLAIR.

S. F. PHILLIPS,
Solicitor-General.

110-329

IN THE

Supreme Court United States.

OCTOBER TERM, 1883.

NO. 1,126.

THE UNITED STATES, Appellant,

vs.

FRANK A. BEHAN.

BRIEF FOR APPELLEE,

Under Rule XX.

J. W. DOUGLASS,

Attorney for Appellee.

WASHINGTON, D. C.:

PRINTED BY W. H. MOORE, 511 ELEVENTH STREET, N. W.

1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1,126.

THE UNITED STATES, APPELLANT,

vs.

FRANK A. BEHAN.

I.

Brief for Appellee, under Rule XX.

It is respectfully, but confidently, suggested that the records of this Court have rarely, if ever, presented a case with less reason for the appeal than in this instance. And this with relation to the facts involved as well as to the rules of law applicable to such cases.

By the River and Harbor Act of March 3, 1879, $60,000 was appropriated for the improvement of the harbor of New Orleans. Under this appropriation, December 26, 1879, a contract was entered into between Major C. W. Howell, of the Engineer Corps, and John Roy, for certain work described in the findings of fact in the record. At the same time, the present claimant, Behan, became one of three bondsmen for the contractor.

Operations under this contract proceeded during the year 1880; but the rate of progress not being satisfactory to the Government Engineers, the contract with Roy was formally annulled in February, 1881.

A letter was then addressed by the Engineer Office to the appellee and his co-sureties, advising them that, if they desired to "continue the work on their own account and under the terms of contract," they would be permitted to do so. To this notice, the appellee responded that he would undertake the work; the other sureties withdrew. Behan was then authorized to proceed,

and was regularly recognized by the Engineer Office as the contractor.

The contemplated work called for a large outlay of ready money, and extensive and prolonged preparation. It involved the purchase of a "plant," (barges, tools, apparatus, and appliances); it involved the collection of an enormous quantity of material and articles, either manufactured to order or otherwise specially procured, and which were for the most part without market value for any other purpose than the special and peculiar work for which they were designed. Proceeding, therefore, with commendable caution, the claimant made special inquiry of the Engineer's Office to ascertain just *how much* material he would be justified in procuring, with a view to the extent of the proposed improvement and the limits of the existing appropriation. In reply he was officially informed that he would be warranted in making the necessary preparations for laying "not to exceed 77,000 or, at most, 80,000 square yards" of matting.

The renewed contract was, therefore, substantially to furnish and lay from 77,000 to 80,000 square yards of matting, at 65 cents a yard, or, at $52,000 for the completed work at the larger figure.

The defendant went to work vigorously under the contract, and was actively engaged when, on the 23d of September, 1881, the Government determined to abandon the work, *through no fault or short-coming of the claimant, but solely because the plan of improvement devised by the engineers was discovered to be a failure;* and on the 29th the work was formally suspended. "Nothing was paid to him."

As soon as notified, the claimant promptly stopped operations and applied repeatedly to the engineers for further instructions; but was advised by them that they had no "instructions to give." The claimant then sold the remaining plant and materials for the best price he could get, and presented his account to the War Department, having first credited upon it the sum realized from the sale. The Secretary of War sent the whole case to the Court of Claims; and that Court, after a full and careful investigation of the case, gave judgment for the claimant for the sum of $33,192.20.

II.

Under these circumstances the contention of the claimant in the Court below was simply this:

The law contemplates in cases of broken contracts two elements of damage:

1. Losses sustained, (which may include necessary expenses incurred in prosecuting the work contracted for, and unavoidable loss upon materials left on hand, &c.)

2. Gains prevented, (that is, profits which the contractor might have made if permitted to perform.)

The present claimant (never having been paid a dollar and being *sent* to the Court of Claims by the War Department under Sec. 1063 Rev. Stat.) sued for $33,192.90 "losses sustained," and $8,707.10 "gains prevented."

The Court, after hearing the case and examining the evidence, said in substance:

"As to the losses sustained, they are fully proven, and claimant *can* recover on that head; but as to the claim for profits, it was not (and from the peculiar and experimental character of the work could not be) conclusively proven; hence on that head claimant *cannot* recover."

If the findings of fact could be reviewed here, the claimant might well complain that the Court below failed to accept the estimate of his unimpeached witnesses upon the question of prospective profits; but surely upon the facts *as found* no rational objection can be raised to the legal conclusions. After careful examination I allege, without fear of contradiction, that a *reported case, ancient or modern, cannot be found where a Court under such circumstances has given the injured party to a contract less than his actual expenses;* and that is all which the claimant has recovered. It would surely be a perversion of justice to hold that he must receive *less* than this; and I do not believe that this Court will ever so hold.

III.

The following cases fully sustain the legal conclusions of the Court below: 8 Wall, 77; 94 U. S., 214; 13 How., 344; 7 C. C.,

544; 16 N. Y., 494; 1 C. C., 95, 106, 342; 2 C. C., 429; 4 C. Cl., 258; 14 C. Cl., 443; 15 C. Cl., 120; 17 C. Cl., 17; 7 Hill, 62; 1 Denio, 317, 602, 606; 6 L. & E., 230.

The case in 8 *Wall*, 77, (Speed's case,) cited in the appellant's brief, was a suit for *prospective profits*, as was the case in 7 *Hill*, 71, referred to by Justice Miller in the opinion in Speed's case, and consequently are not analogous to this case. This case, by the action of the Court below, is confined to the question of *actual outlay and unavoidable losses on materials on hand.*

Speed's case does not conflict with the general rule of "compensation for *actual loss and expenditure*," the lowest and lightest measure of damages as against the rescinding party to a contract, but merely gives the true rule by which to measure damages on a claim for *prospective profits.*

Sickles' case, tried in the Court of Claims in 1865, (see 1 C. C., 214, and 2 C. C., 143,) was in many respects strikingly like the present case. Sickles contracted to build a light-house for the Government. The plans and specifications were furnished by the Government, and he proceeded with the work. After a certain amount of materials had been procured by the contractor and the work commenced, it was discovered that the execution of the work was a "physical impossibility;" the Light-House Board declining to have anything to do with the matter, the work was stopped. The contractor brought suit to recover damages, and the Court held that—

"Where the Government selects both the plan and the site for the erection of a light-house, it is responsible for them. The erection of the building being abandoned as a 'physical impossibility," without fault on the part of the contractor, he is entitled to recover '*his actual outlay.*'"

In this decision the Government acquiesced without appeal. The marked similarity between that case and the present one, and the final action of the Government in that, renders the appeal in this case the more incomprehensible. What shadow of a reason can be given for denying equal treatment to Behan?

IV.

As the question of probable *gain* or *loss* is a *question of fact* in all such cases, it is contended by the claimant that the "finding" of the Court below on that point is conclusive and indisputable on appeal.

The claim now set up by the appellant for the first time in this case, in the brief in this Court, that the claimant ought not to have recovered *anything* in the Court below, is monstrous in its proposed injustice to Behan, and in utter disregard of all the settled rules for measuring damages in such cases.

It is not surprising that the Court below were not able to conclude whether the contract would have been profitable or not for the claimant. The Mississippi is uncertain and irresistible in its changing current, and the findings show that the Government plan was experimental at the start and useless at the end. No matter what the practical result of the plan might have been had the claimant been allowed to go on, the Government having stopped operations after the claimant had expended for labor and materials $33,192.20, it is "responsible," as was said in the Sickles case by the Court, and is bound in law "to reimburse the party his actual outlay." The counsel for the appellant did not hint at such a proposition, as their last, in the Court below, and they cite no authority to support it here.

The position of the appellant is about this: The Government having seriously injured the claimant by entrapping him into a contract for the execution of an *impracticable* plan, now proposes to rob him *ad libitum* while he is crippled and down. It is proper and beautiful, at times, to die for one's country, but the most refined patriotism has never yet required of the individual citizen, in times of peace and in courts of justice, to welcome or submit to financial destruction.

Respectfully submitted.

J. W. DOUGLASS,
Attorney for Appellee.